

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

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Federal Communications Commission
Office of Secretary

In re)
)
Amendment of Section 73.202(b),) MM Docket No. 96-103
FM Table of Allotments) RM-8794
(Smith and Reno, Nevada;) RM-8839
Susanville and Truckee, California))

TO: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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**SUPPLEMENTAL COMMENTS RELATIVE TO
REIMBURSEMENT OF LICENSEES OF KHJQ(FM) AND KRNV-FM**

Dennis J. Kelly

LAW OFFICE OF DENNIS J. KELLY
Post Office Box 6648
Annapolis, MD 21401

Counsel for:

Chris W. Kidd d/b/a
KIDD COMMUNICATIONS

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SUMMARY

The sole purpose of these "Supplemental Comments" is to bring to the attention of the Allocations Branch legal precedents in the area of reimbursement of existing stations for channel changes to accommodate a new allocation and to make observations as to the items claimed for reimbursement by Station KHJQ, Susanville, California and by Station KRNV-FM, Reno, Nevada. A motion seeking acceptance and consideration of these "Supplemental Comments" is simultaneously and separately submitted to the Commission.

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Chris W. Kidd d/b/a Kidd Communications, by his attorney, hereby respectfully submits these Supplemental Comments Relative to Reimbursement of Licensees of KHJQ(FM) and KRNV-FM. A Motion for Acceptance of Supplemental Comments has been filed with the Secretary of the Commission simultaneously with the filing of these Comments.

Preliminary Statement

1. In response to the **Order to Show Cause** in the above-entitled proceeding, DA 97-632, released April 2, 1997, two pleadings were filed on May 27, 1997: (1) an "Opposition to Show Cause Order" by Sierra Broadcasting Corporation, licensee of FM Broadcast Station KHJQ,

Susanville, California; and (2) "Responsive Comments of Sunbelt Broadcasting Company to Order to Show Cause" by Sunbelt Broadcasting Company, licensee of FM Broadcast Station KRNV-FM, Reno, Nevada. Both these stations would be required to change channels in order to accommodate a new FM Broadcast Station on Channel 268A at Truckee, California. As the proponent of the Truckee allocation, Kidd is a party in interest as to any mandatory items of reimbursement that the Commission should order. Indeed, Kidd would be an aggrieved party should the Commission, without consideration of his views on the subject, accept and "set in stone" all reimbursement requests made by the licensees of KHJQ and KRNV-FM in their May 27, 1997 submissions. Thus, Kidd seeks the Commission to consider his comments dealing with the narrow issue of the extent of reimbursement for the channel changes to which KHJQ and KRNV-FM may be entitled.

General Principles

2. At the outset, Kidd urges the Commission to make clear in the Report and Order stating the outcome of this proceeding that the winner of the construction permit for Channel 268A at Truckee, California is the party responsible for the reimbursement of stations KHJQ and KRNV-FM. While Kidd eagerly awaits the opportunity to file an application

for a construction permit for the Truckee allocation, there is no guarantee that Kidd will be awarded the construction permit, and there is no precedent for requiring Kidd, in the event that he is not the prevailing applicant for Truckee, to have any obligation whatsoever to reimburse KHJQ and/or KRNV-FM.

3. Kidd agrees with paragraph 4 of KHJQ's comments that the frequency shifts required to accommodate the Truckee station need not be made unless and until there is a construction permit for Channel 268A at Truckee and construction of the resulting station is substantially complete and the station is nearing the commencement of operations.

4. However, Kidd disagrees with Sierra's opposition to the channel shift for KHJQ. Indeed, KHJQ's position is contrary to Section 304 of the Communications Act of 1934, as amended, 47 U.S.C. §304, which states:

No station license shall be granted by the Commission until the applicant therefor shall have waived any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

5. The prevailing applicant at Truckee should be subject only to the prevailing Commission policies regarding reimbursement of expenses to the licensees of stations KHJQ

and KRNV-FM. Those policies are stated in **FM Table of Allocations, Columbus and Circleville, Ohio**, 8 FCC 2d 159 (1967), at ¶¶11-13:

11. Reimbursement: Who should pay. -- WNRE claims that it should be reimbursed by Christian Voice whether or not that party becomes the permittee on the new Columbus channel; Christian Voice asserts that it should be responsible only if it gets the channel and that whoever becomes the permittee should be the source of reimbursement. We agree with Christian Voice. **In the Kenton-Bellefontaine case cited by WNRE, and in other such cases, we have repeatedly stated that the reimbursement should come from the party benefiting from the change; i.e., whoever becomes the permittee on the new channel (see 3 FCC 2d 605).**

12. Cost items claimed -- As mentioned above, WNRE sets forth a total of \$15,409 which it believes to be 'legitimate and necessary out-of-pocket expenses' and asks the Commission to rule on which items we believe are reasonable and prudent, and require Christian Voice to commit itself to pay them. Christian Voice in reply comments (supported by an engineering affidavit) questions several of the cost figures and asserts that one item -- losses in revenue -- should not be included at all. We do not here pass upon the amounts set forth, since it cannot now be determined what they will actually prove to be; it appears at this point that Christian Voice's lower figures will likely be closer to the mark. The largest sum we have approved in these cases is \$2,800. We believe it appropriate, for the guidance of the parties here and in similar cases, to make certain observations as to what items may be the subject of reimbursement:

(a) Engineering, legal and equipment. -- WNRE claims a total of about \$6,700 in engineering and technical costs (\$5,000 for a new antenna and installation, \$175 for monitors, \$15 for a frequency-measuring service, \$1,000 in consulting engineering fees, and \$500 in legal fees). Christian Voice questions the amount for the antenna and the consulting engineering fees. We believe that the items mentioned are all appropriate for reimbursement, though, as stated, not necessarily the amounts claimed. [FN6] We make one observation: **A licensee required to change frequency is entitled to reimbursement for equipment only to the extent new equipment is actually required (i.e., some antennas can be retuned for a relatively small shift), and only for equipment**

corresponding to that previously in use. In other words, the benefiting party should not be required to pay for improving and modernizing the existing station's facilities.

(b) Printing (logs and stationery), \$89. -- Assuming new logs have to be printed, this appears appropriate.

(c) Out-of-pocket nonreducible expenses while station is off the air. -- WNRE claims it will be off the air 1 to 2 weeks, with expenses continuing at the rate of \$983 a week, which is claimed (salaries \$850, telephone, rent, etc.). Christian Voice asserts the changeover can be made in a 12-hour period, certainly no more than 1 to 2 days of off-air time, or \$382 at the rate mentioned. **These expenses appear appropriate for reimbursement for whatever silent period is actually needed to make the required adjustment. It is expected that the licensee will attempt to resume operation as soon as possible.**

(d) Advertising promotion for new frequency. -- WNRE claims \$4,511 for newspaper advertising, including advertising for a 6-month period in a Columbus daily, a Circleville paper and four other area papers. Christian Voice criticizes this figure, asserting that 6 months' advertising is not necessary, since most of the informational job could be done by announcements over the station. **We agree with WNRE that a certain amount of newspaper advertising should be reimbursable, but as mentioned above in connection with equipment, we do not believe the benefiting party should be required to pay for improving the situation of the existing station.** While we do not now decide the question, it appears unlikely that more than \$1,000 would be appropriate on this score.

(e) Loss of revenue. -- WNRE estimates its loss of revenue - - both during off- air time and subsequently through failure of advertisers to renew until listeners become familiar with the new dial position -- at \$3,000. **Christian Voice asserts that the Commission should adhere to its position in the Kenton-Bellefontaine case that such losses are not properly the subject of reimbursement, because they are speculative and conjectural at best, the holding of a license is not a guarantee of profits or revenues, and the holder is not entitled to reimbursement for loss thereof if the public interest requires a change in facilities. (See 3 FCC 52d 605, 7 R.R. 2d 1608-1609.) We adhere to this position. See Nelson Bros. Bond and Mortgage Co. v. FRC, 289 U.S. 266 (1932).**

(f) Miscellaneous (telephone calls, etc.) \$100. -- Reimbursement for such items appears appropriate.

13. We expect the parties to be guided in their negotiations by these observations. It is expected that they will attempt in good faith to reach agreement.

[emphasis supplied]

6. Therefore, and contrary to the assertion of KHJQ in paragraph 7 of its "Opposition" that "any applicant at Truckee . . . will be responsible for payment of all costs incurred by Sierra, including technical and promotional costs", it is clear from the verbatim recitation of **Circleville, Ohio** that the successful applicant at Truckee is responsible for only those costs which are properly reimburseable—i.e., only those sums which enable KHJQ to move to its new channel, without the requirement of improving or modernizing KHJQ's facilities.

7. Turning to the subjects of (1) Kidd having to make a financial showing in this proceeding and (2) an advance escrowing of funds necessary to effectuate the channel changes of stations such as KHJQ and KRNK-FM, the Commission addressed this matter in **FM Table of Allotments, Columbus, Nebraska, et al.**, 51 Fed. Reg. 4926, 59 RR 2d 1184 (1986), at ¶7:

Finally, all of the parties who filed comments in this proceeding expressed concern over the ability of the licensee of Station KTTT-FM to reimburse five stations for the costs of changing channels. We believe that their concerns are understandable and warrant comment on our part. In most cases, the petitioner and the

affected station can usually arrive at the appropriate reimbursement amount and the channel changes and reimbursement are promptly effectuated. **However, it is not always the petitioner which ultimately becomes the party responsible for reimbursement. It is the ultimate permittee. Thus we do not require the petitioner to demonstrate its financial ability to reimburse other stations in the context of the rulemaking proceeding.** On the other hand, affected stations cannot be expected to incur significant expenses without the assurance of prompt reimbursement. For this reason, it is quite conceivable that we would require a licensee to demonstrate its financial ability to affected stations. Having the necessary funds available and placed in escrow would be a reasonable request by an affected station. [emphasis supplied]

8. Applied to this case, **Columbus** stands for the proposition that (1) Kidd does not have to show his financial qualifications as a part of this rulemaking proceeding in order for the Truckee allocation to be made; (2) the Commission can make clear in the "Report and Order" in this case that applicants on FCC Form 301 for the Truckee allocation must demonstrate sufficient funds from available sources to (a) construct, (b) reimburse KHJQ and KRNV-FM those amounts required pursuant to **Circleville** and (c) operate for three months without expectation of revenue; and (3) that prior to KHJQ and KRNV-FM commencing work on the effectuation of the required channel changes, the ultimate permittee for Truckee shall have reached agreement with both stations on the nature and amount of the reimbursement and

that such funds shall be secured by an appropriate escrow deposit and/or letter of credit.

9. Indeed, Kidd wishes to avoid the situation of the **Peter Wayne Lechman** case cited by KHJQ; as the undersigned understands the facts in that case from his personal acquaintance with Mr. Lechman, the party which was required to change channels made the changes without prior consultation with Mr. Lechman, and then sent Mr. Lechman a bill for expenses which Mr. Lechman found to be excessive in many respects--the reimbursement dispute ultimately dragged on into the United States Court of Appeals in Washington.

10. Kidd seeks to avoid this by an understanding where the ultimate permittee would have an agreement for expense reimbursement with KHJQ and KRNK-FM before either of them spends the first dollar on the required channel change. Kidd would like to see a procedure written into the "Report and Order" dealing with the inability of the parties to reach a reimbursement agreement in which either an attorney on the Audio Services Division staff or an Administrative Law Judge would provide "alternative dispute resolution" services to facilitate an agreement.

Specific Reimbursement Sought By KHJQ

11. Kidd would urge the Commission not to saddle the ultimate Truckee permittee with specific reimbursement requirements at this time, as things may change over time (and it is unclear when, if ever, a construction permit at Truckee will be awarded given the present absence of comparative broadcast selection criteria).

12. However, with respect to KHJQ's May 27, 1997 submission, Kidd would make the following observations. To the extent that the KHJQ antenna would have to be replaced and the Truckee permittee would be responsible for the cost of a new ERI antenna, the Truckee permittee would be entitled to ownership of the old KHJQ antenna for re-tuning and re-sale on the used equipment market, in order to defray a portion of its costs.

13. With respect to revenue lost while the station was undergoing the channel change, **Circleville** is clear that this is not a reimbursable item.

14. With respect to the marketing budget, the basis for the "letterhead/marketing materials" reprint, "station vehicles", "station apparel" and "estimated remarketing of new dial position - first year", which comprise an aggregate

of \$20,350.00, is not stated. This is why the Commission cannot "set in stone" reimbursement dollar amounts at this time, but must wait for events as they are at the time the Truckee station is actually going to be built. For example, it seems to us that \$6,000.00 for printing costs would only be appropriate were KHJQ to have a large quantity of printed materials on hand, already paid for, and useless in view of an imminent channel change. The Commission and KHJQ must remember that KHJQ is to be left in the same place, not an improved place, as the result of a channel change. KHJQ can mitigate its costs on new printed materials by not maintaining on hand an excessive amount of such materials. Billboards, replacement banners and reasonable newspaper advertising appear to be reasonable (Susanville, California is a small town located some 80 highway miles northwest of Reno, Nevada). However, the Truckee permittee cannot be saddled with the cost of a new and expensive marketing campaign which the Susanville licensee might never had undertaken without a Truckee "sugar daddy".

Specific Reimbursement Sought By KRVN-FM

15. KRVN-FM's pleading seeks an unconscionable amount of reimbursement for its move from 101.7 MHz to second-adjacent channel 102.1 MHz. No legal precedents are cited

to support KRNV-FM's unmitigated greed. It is to be remembered that Section 304 of the Communications Act does not guarantee any licensee permanent rights to use a particular frequency, and in any event in every facilities application it has ever filed with the Commission KRNV-FM has waived its rights to perpetual use of its current frequency.

16. Kidd has compared KRNV-FM's May 27 submission to what he knows about KRNV-FM, and makes the following observations. First, the alleged equipment cost of \$50,000.00 is totally unreasonable, and, so far as we know, not based in fact. Kidd understands KRNV-FM's current transmitter to be an old CCA transmitter originally tuned for 102.1 MHz and which was retuned to 101.7 MHz. It would appear that the only modification to this transmitter would be the retuning of the exciter, which to our knowledge could be done in less than one-half of one day. Further, because of the proximity of 101.7 MHz and 102.1 MHz, the KRNV-FM antenna could be retuned with three days of field service by a factory technician at a cost of \$400.00 per day. Kidd believes that the antenna retune could be accomplished for just a few thousand dollars.

17. Next we come to KRNV-FM's remarkable request for reimbursement of a \$300,000.00 marketing campaign for its channel shift of two notches on the dial from 101.7 MHz to 102.1 MHz. At the outset, the Commission should be aware that KRNV-FM's licensee is co-owned with Sierra Broadcasting Company, licensee of KRNV-TV, Channel 4, Reno, Nevada, an NBC affiliate. Indeed, KRNV-TV received a "one to a market" waiver of Section 73.3555 of the Commission's Rules in order to acquire KRNV-FM. **Olympic Broadcasters, Inc.**, 10 FCC Rcd 8104 (July 26, 1995). It would be unconscionable to require the ultimate Truckee permittee to pay for advertising on KRNV-FM's own co-owned television station to announce the KRNV-FM channel shift. It is to be noted that KRNV-FM seeks to hoist itself by its own petard in complaining about the large number of stations in Reno, when it is considered that if there were not so many stations, the "thirty voices" test required in the waiver showing could not have been met.

18. KRNV-FM also misrepresents its facilities on page 2 of its pleadings, claiming that it operates with only 1.3 kilowatts of power, when, as it turns out (according to the FM Query page of the FCC's Internet site), KRNV-FM's licensed facilities under BLH-941122KA are 11.000 kilowatts of effective radiated power at an antenna height of 150

meters above average terrain, or approximately maximum Class C3 facilities. Furthermore, KRNv-FM misrepresents its program format. Kidd informs the undersigned that KRNv-FM is not an "all news format" station, as represented by KRNv-FM on page 2 of its "Comments"; rather, KRNv-FM presents talk programming, including a local talk show from 10:00 a.m. to noon, and "The Oliver North Show" from 12:30 p.m. to 3:00 p.m. (Pacific Time). According to Kidd, KRNv-FM simulcasts the audio portion of newscasts aired over co-owned KRNv-TV.

19. Clearly, if KRNv-FM cannot accurately inform the Commission as to its technical facilities and programming, it cannot be relied upon as to the accuracy of its claimed expense reimbursement. Nothing in any Commission policy or decided case requires the Truckee permittee from having to pay for a gilt-edged promotional campaign by KRNv-FM. KRNv-FM has the facilities to mitigate the need for an expensive campaign by announcing the channel change over its co-owned NBC affiliated television station, KRNv-TV. KRNv-FM's greed and overreaching highlights the need for an arbitration process to protect the pocketbook of the ultimate permittee at Truckee, who merely seeks to provide a first local FM station to a community of less than 4,000 population.

Conclusion

WHEREFORE, Kidd Communications urges that the Commission resolve the issue of reimbursement in the above-captioned proceeding in accordance with the views stated in these Supplemental Comments.

Respectfully submitted,

KIDD COMMUNICATIONS

By 

Dennis J. Kelly
(D. C. Bar #292631)
His Attorney

LAW OFFICE OF DENNIS J. KELLY
Post Office Box 6648
Annapolis, MD 21401
Telephone: 888-322-5291

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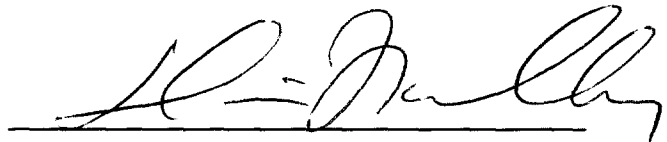
CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing "Supplemental Comments, etc." were served by first-class United States mail, postage prepaid, on this 13th day of June, 1997, upon the following:

Dan J. Alpert, Esquire
Law Office of Dan J. Alpert
2120 N. 21st Road, Suite 400
Arlington, VA 22201
Counsel for Sierra Broadcasting Corp. (KHJQ)

J. Dominic Monahan, Esquire
Luvaas Cobb Richards & Fraser, P. C.
777 High Street, Suite 300
Eugene, OR 97401
Counsel for Sunbelt Broadcasting Co. (KARNV-FM)

High Sierra Communications, Inc.
Attention: David Metts
6137 Torrington Drive
Reno, NV 89511


Dennis J. Kelly